

No. 12,484

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN AUTOMOBILE INSURANCE COM-
PANY and AMERICAN AUTOMOBILE FIRE
INSURANCE COMPANY,

Appellants,

VS.

AMERICAN AUTO CLUB,

Appellee.

BRIEF FOR APPELLEE, AMERICAN AUTO CLUB.

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I.

PRELIMINARY STATEMENT.

Appellants, who were plaintiffs below, sought an injunction prohibiting the use by appellee of appellee's corporate name. They have appealed from an adverse judgment rendered by the Honorable C. E. Beaumont. Appellee concurs in the statement of jurisdictional facts set forth in appellants' brief, page one.

This matter depends primarily upon factual questions, and in their brief, appellants have failed to

present either the basic factual issues or the basic legal principles upon which this case turns. Instead, they have passed quickly over the important facts, and have established at some length, legal principles which appellee has never attacked. As will appear in our statement of facts, the case is quite different from that presented by appellants' brief. Briefly, appellee's position, and the decision of the trial Court is this:

Appellee is not an insurer; its business is that of a motor club, the function of which is wholly different from an insurance business. Appellants are insurers, and as far as insurers are concerned, similarity of names (almost to the point of identity) is the rule. For example, there are 65 insurers having the word "American" as the first word in their names; more than 50 having the word "National"; more than 12 having "United States"; more than 10 having "Southern" or "Central" or "Western"; more than 10 having "Associated" or "Farmers" or "General".* There is a reason for this. Casualty and surety companies make no direct appeal to and do not do business directly with the general public, as do life insurance companies. Casualty and surety companies do business with licensed, experienced, agents and brokers, who have their own clientele. The established practice is for this clientele to order insurance coverage from

*This is but a partial list. See Deft.'s Exh. O for a more complete statement. See also *Standard Accident Insurance Co. v. Standard Surety & Casualty Co.* (D.C. S.D. N.Y.), 53 Fed. 2d 119, at p. 120.

their particular agent or broker, who, in turn, places it with whatever insurers he wishes. The good will of casualty and surety companies exists only among such agents and brokers, and it is such people that these insurers solicit. The public places its faith in the agent or broker, and in the existence of state regulatory measures, and is not educated to and does not place reliance upon particular companies.

The licensed agents and brokers are experts in the field of insurance and are familiar not only with the identities of the various companies and the very clear distinction between a motor club and an insurance company, but are also well acquainted with the personnel of the various insurers with whom they place their business. They are not confused by the 65 insurers having "American" as the first word of their names, or by the 50 using the word "National", etc.

The words involved in the instant case are "American Auto". It is agreed by the parties that since these are geographical, generic terms, no *property right* in them can be acquired by any person. Therefore, appellants may not claim the protection of any property right in the name itself. It is also conceded, however, that this fact is not determinative of the instant case. In addition to protecting names in which a property right has been acquired, Courts will prohibit, as unfair competition or an unfair trade practice, the use by another of a name in which no property rights inhere but which is being used for the purpose of, or the use of which will result in, confu-

sion in the minds of the people with whom the two firms deal; the consequences of this being an unfair advantage to the second user or a misleading of such consumers.

The standard by which cases falling into this latter category are decided is the doctrine of "secondary meaning". This phrase ultimately means that where one firm has become known to the people with whom it deals by a certain name, another firm will not be allowed to use the words constituting that name where the result of such use would be to induce the customers of the first firm to think that it was still dealing with the first firm when it was actually dealing with the second firm.

It is established in this case that appellants have made no efforts of any importance since 1944 to identify themselves by the term "American Auto"; and that appellants do not deal directly with the public but with an enlightened group of experienced agents and brokers among whom no confusion would result from the use by appellee in its business of the name American Auto Club. There can be, therefore, no identification by these people of appellee with appellants, and there is no basis upon which appellee should be prohibited from using its name.

This is the case tried in the District Court and this is the case brought before this Honorable Court for review.

II.

STATEMENT OF FACTS.

By this action appellants American Automobile Insurance Company and American Automobile Fire Insurance Company, whose business is chiefly that of casualty insurance,¹ seek to enjoin appellee, American Auto Club, from conducting the business of a motor club under the name which it has taken. Appellee does not intend to conduct an insurance business, nor does it intend to enter the "service field"² in which appellants perform services.

Appellee is a corporation organized, existing and certified as a motor club under the laws of the State of California.³ It may and it will sell and offer for sale and furnish to persons who become its members,⁴ motor club services such as towing service, emergency road service, bail bond service, discount service, financial service, buying and selling service, theft service, map service, towing service, claim adjustment service, license service, insurance service, hunting, fishing and camping service. It will also furnish to its members a protective emblem.⁵ Neither these identical services nor an emblem are furnished by appellants to their assureds. Appellee's service contract with each of its members contains, as is required by law, "a statement in not less than fourteen-point modern type at the head

¹Tr. p. 54.

²Appellants' Opening Brief, p. 2; Tr. pp. 42 and 43.

³Calif. Insurance Code, §§ 12140-12511. Deft's Exh. M.

⁴Ibid. §§ 12142-12144.

⁵Pltf's Exh. 1.

of said contract stating 'This is not an insurance contract' ".⁶

The claim adjustment service offered by appellee to its members consists of putting its members, who have claims against an insurance company, in touch with the adjuster for the insurance company and assisting, if possible, in securing a proper adjustment.⁷ The insurance service offered by appellee to its members consists of referring them to licensed agents or brokers through whom casualty insurance can be procured.⁸ Appellee is not licensed to sell insurance.⁹ These services do not conflict in any real way with any services furnished by appellants to their assured.

Appellee was organized in 1948 by the Muller brothers of Hollywood, California. The Muller brothers, shortly after World War I, established and now operate a service station and garage business in Hollywood, California. Over this period of time they have built up a large institution in which about 175 people are employed and over a million dollars is invested.¹⁰ For approximately fifteen years prior to 1948 the Muller brothers, as a partnership, among other things, conducted an official garage for the Automobile Club of Southern California. During that time the partnership acquired, for the operation of this business, several hundred thousand dollars worth of equip-

⁶Calif. Ins. Code, § 12252. Pltf's Exh. 2.

⁷Tr. p. 44.

⁸Tr. pp. 46-51.

⁹Tr. p. 217.

¹⁰Tr. p. 236.

ment consisting of, among other things, tow trucks, pickups, battery service trucks, and tire service trucks. Its connection with the Automobile Club of Southern California was terminated in 1947 through a political maneuver over which the partnership had no control. Then to utilize this equipment, maintain contacts with its customers and to secure repair work for their garage, the Muller brothers caused appellee to be organized.¹¹

Appellee was incorporated under the name Auto Club of Hollywood. Its name was submitted for approval to the Insurance Commissioner of the State of California, as is required by law.¹² The Insurance Commissioner refused to approve for appellee either the name Auto Club of Hollywood or Automobile Club of Hollywood.¹³ Thereafter appellee chose its present name, American Auto Club, which was approved by the Insurance Commissioner.¹⁴

Appellants' principal business is the writing and selling of automobile insurance of various kinds.^{14a} In their own words, appellants conduct "their business only through accredited agents and brokers".¹⁵ Appellants have no customers other than these accredited agents and brokers through whom all of the insurance they write is sold.¹⁶ Each of these ac-

¹¹Tr. pp. 236-7.

¹²Insurance Code, § 12194.

¹³Tr. p. 212.

¹⁴Tr. p. 205.

^{14a}Tr. pp. 52-54.

¹⁵Deft's Exh. N. Tr. p. 103.

¹⁶Deft's Exh. N.

credited brokers or agents has his own clientele.^{16a} In advertisements directed to such agents and brokers, appellants say, speaking of their branch offices, that each is a miniature “home office”, always ready to help you serve “your customers”.¹⁷

In purchasing for their clientele such insurance as is written and sold by appellants, these accredited brokers and agents *in practically every instance themselves select the company* with which the insurance is placed; and this testimony is without conflict.¹⁸ These accredited agents and brokers are well informed within the field of insurance and are well aware of the identities of the insurance companies with which they deal and with whom they place their business. They are trained to as nearly as possible a professional capacity¹⁹ and they regard themselves as professional men in the insurance field.²⁰ No confusion will result among them because of any similarity between the names of appellants and appellee.²¹ Appellants’ contact with their assureds is in connection with claims, which of necessity have arisen out of insurance already purchased.^{21a}

Except for a period of approximately three weeks in 1936, appellants have never advertised in any newspapers of general circulation or other media of gen-

^{16a}Tr. pp. 119, 138, 159 and 219-229.

¹⁷Deft’s Exh. N.

¹⁸Tr. pp. 114-122, 139-154, 159-221, 229.

¹⁹Tr. pp. 136-7.

²⁰Tr. p. 114.

²¹Tr. pp. 114-5.

^{21a}Tr. pp. 82-4.

eral circulation among the general public under the name of "American Auto" or otherwise.²² Appellants' advertising has been confined to trade journals circulating among persons in the insurance business,²³ and to folders sent to agents and brokers for distribution by them.²⁴ There is no evidence that these folders or "stuffers" were widely distributed, and such distribution as there may have been ceased in 1944.²⁵

In 1944 appellants, who are under "common ownership" and management, acquired two other insurance companies, Associated Indemnity Company and Associated Fire and Marine Insurance Co., the employees of all of which companies are paid their salaries by American Automobile Insurance Company.²⁶ Since the acquisition of these companies, appellants have not tried to develop or increase their automobile insurance business.²⁷ They have stopped any advertising for that business. Such advertising as appellants have done since 1944 has appeared in trade journals and has featured "American Associated" and "American Associated Insurance Companies" and not "American Auto".²⁸ Appellants have adopted and use on their letterheads and insurance policies and elsewhere an emblem featuring "American Associated". On such

²²Tr. pp. 65-69.

²³Tr. pp. 61-66. Deft's Exh. N; Pltf's Exh. 3.

²⁴Tr. pp. 69-71.

²⁵Tr. pp. 70, 150-1.

²⁶Tr. pp. 83-86.

²⁷Tr. p. 173.

²⁸Deft's Exh. N.

advertising and on such policies and elsewhere, when appellants' names appear, each is spelled out in full.²⁹

In doing this appellants were following a trend in insurance circles of having insurance companies under common ownership known by a group name, such as "Loyalty Group" and "Royal".^{29a}

Prior to 1944 appellants' Los Angeles telephone operators answered appellants' telephone by saying "American Auto". Since 1944 the answer has been changed to "American Associated".³⁰

In the Los Angeles telephone directory appellant American Automobile Insurance Co. is listed as American Auto Insurance Co.,³¹ but in greater St. Louis, its home office, it is listed as American Automobile Ins. Company.³² In each instance appellant's name follows the listing American-Associated Ins. Co.³³ In the San Francisco, Calif., Washington, D. C., Minneapolis, Minn., Detroit, Mich. and Baltimore, Md. telephone books and others appellant American Automobile Insurance is listed with the word "Automobile" spelled out in full. In several of these books also appear other businesses in whose names the words "American Auto" appear.³⁴

In 1947 there were approximately 33 insurance companies authorized to transact business in California

²⁹Pltf's Exh. 11 and Deft's Exh. B.

^{29a}Tr. pp. 229-230.

³⁰Tr. p. 163.

³¹Tr. p. 76.

³²Tr. p. 90.

³³Tr. pp. 78 and 90.

³⁴Tr. pp. 96-100.

whose names start with the word "American".³⁵ There are also in California eight companies listed as agents or brokers whose names start with the word "American".³⁶ Best's Insurance Guide³⁷ for 1948 lists approximately 65 insurance companies whose names start with the word "American".

In the selection of its name appellee had no intent to capitalize upon or take advantage of any similarity which exists between its name and appellants' names or either of them. Appellee's name was selected in good faith.³⁸

III.

ARGUMENT.

A. PRELIMINARY STATEMENT.

As we have stated above, this case presents this very simple issue: Where it is established that the use by appellee of its name will cause no confusion and no damage to appellants or their business and will result in no unfair competition or unfair trade practice, and the people who are aware of appellants' existence will not identify appellee with appellants, is it not proper to refuse appellants injunctive relief?

The adequacy of appellants' statement of facts, and the inferences which they draw, are challenged by

³⁵Deft's Exh. I.

³⁶Deft's Exh. J.

³⁷Deft's Exh. O. In the insurance field the similarity between names is very marked, as will appear from an examination of this exhibit.

³⁸Tr. pp. 262-3.

appellee, as is apparent from the documented restatement of facts contained in this brief. On the other hand, most of the law contained in appellants' argument is readily conceded by appellee. This law, of course, depends for its application upon the existence of facts to support it. The cases cited by appellants are supported by facts. The instant case contains no factual basis for the issuance of an injunction under those rules of law. We will first discuss appellants' brief, and then demonstrate that the judgment of the trial Court was correct.

B. APPELLANTS' BRIEF.

On pages 10-18 of appellants' brief, it is argued that geographic, generic words in a name may, in a proper case, if they have acquired a secondary meaning, form the basis of an action for an injunction to prohibit unfair competition or unfair trade practices. This, of course, is conceded by appellee.

On page 21 appellants argue that approval of appellee's name by the California Insurance Commissioner is not conclusive of this proceeding. That, too, appellee concedes.

On pages 22 to 28, appellants argue that they have not abandoned the name American Auto. Appellee does not agree with this claim, but it is immaterial and the Court made no finding of any such abandonment. The point is that the evidence showed that since 1944 appellants have sought to become known as "American

Associated Insurance Companies” and “American Associated”, and have done no advertising in connection with automobile insurance or otherwise under the name American Auto. This obviously is very relevant evidence on the issue of whether appellants are so identified by the term American Auto that unfair competition will result among uninformed people by the use by appellee of its corporate name.

On pages 29-33 of their brief, appellants seek to establish the fact that appellee intends to compete with them. Although appellee’s articles of incorporation are, like all articles, broad, and would permit it to do an insurance agency or brokerage business, it is not licensed to do so and does not intend to do so.³⁹ More important, appellee will be dealing directly with the public and offering the services of a motor club. Appellants on the other hand simply write insurance and acquire their business solely through the enlightened agent and brokers who act as independent middlemen.

In these first 34 pages of its brief, appellants seek to establish as a matter of law that they have become known generally by the name “American Auto”, that such term has acquired a secondary meaning and that confusion will inevitably result from the use by appellee of its name in a different field. To support this claim appellants rely ultimately upon two facts: (1) In the Southern California telephone directory it lists its name as “American Auto” as well as Ameri-

³⁹Tr. pp. 42 and 43.

can Associated Companies; (2) It receives an average of four or five calls a day from persons wishing to contact the American Automobile Association, rather than applicant.

It seems self-evident that this testimony supports appellee's position. It certainly does not tend to prove that *appellants* are known as "American Auto."

If the public knew only appellants as "American Auto", how could they telephone appellants when they were trying to reach the American Automobile Association? Obviously this group of people does *not* identify appellants by the name "American Auto" for they call appellants in the belief that appellants are someone else. If there is any conclusion to be drawn from this evidence, it is that appellants are unfairly identifying themselves with the American Automobile Association, and that they should not list their name in the directories in a manner which thus invites such confusion.

Although American Automobile Association is a "motor club", as is appellee, there is no evidence that appellants, in spite of the identity of names, ever took any action to cause it to change its name. The existence of the case of *American Automobile Association v. American Automobile Owners Association*, 216 Cal. 125, 13 Pac. (2d) 707, affords judicial notice of the fact also that there is a third motor club of almost identical name, which appellants apparently have felt would invite no confusion.

The argument made by appellants to the effect that it is a very simple matter for appellee to select a name wholly different in all respects from that of appellants overlooks several things. To begin with, appellee's name is not its first choice. It originally took the name *Automobile Club of Hollywood*. It was only when the Insurance Commissioner did not approve this name that appellee adopted the name *American Auto Club*.

The second point overlooked is that a mere reading of defendant's Exhibit O (containing the list of corporate names) shows that there is no name which appellee could adopt which would not be subject to some kind of attack similar to that made by appellant.

At some point appellee had to take a stand and since its present corporate name was declared satisfactory by the Insurance Commissioner of the State of California in spite of the existence of appellants, appellee drew that line with its present name.

The remaining portion of appellants' brief approaches the real issue in this case and our answer to it is contained in the statement which follows of appellee's position.

C. UNDER ESTABLISHED PRINCIPLES OF THE LAW OF UNFAIR COMPETITION, APPELLANTS ARE NOT ENTITLED TO THE INJUNCTION SOUGHT.

As stated, the evidence established not only that appellants' name is not unique among insurance companies but that it does business not with the general public but with licensed agents and brokers who in turn deal with the public. These licensed agents and brokers, experts in the insurance field, then place insurance with the companies. They develop a clientele which relies upon them to select the company best suited to write the insurance ordered from them. It is established that these agents and brokers would not be confused or disturbed by the existence of appellee as a motor club under its corporate name, and would not identify appellee with appellants (which is the crux of any question of "secondary meaning"). There could therefore be no damage to the business or reputation of appellants. Further, it must be remembered that it was appellants' burden to show that they were known to the uninformed and inexpert public as "American Auto" and that confusion would result, to its damage, from the existence of appellee. They have not only failed to establish these facts but they didn't even undertake to do so.

Under these circumstances the law is clear.

In *Nims on Unfair Competition and Trademarks*, Vol. II, page 1033, it is stated:

"Banks, investment houses, insurance companies and similar concerns usually have a clientele so experienced and discriminating that the

probability of confusion is considerably reduced, and the names of such concerns are adequately distinguishable even though they are so similar that if a different type of business were involved, confusion would be inevitable.”

In support of this text, the author cites:

Fidelity Bond & Mortgage Co. v. Fidelity Mortgage Co. (C.C.A. 6, 1926), 12 Fed. (2d) 582;

Fidelity Bond & Mortgage Co. v. Fidelity Bond & Mortgage Co. of Texas, (C.C.A. 5, 1930), 37 F. (2d) 99;

Lawyers Title Insurance Co. v. Lawyers Title Insurance Corporation (C.A. D.C. 1939), 109 Fed. (2d) 35, 45; 43 P.Q. 166.

Standard Accident Ins. Co. v. Standard Surety & Casualty Co. (D.C., S.D.N.Y.), 53 Fed. (2d) 119, was a case almost identical to the case before this Honorable Court and the results thereof are the same as that reached by the court below. The court there said (pp. 120 to 122):

“The good will of casualty and surety companies is, therefore, not so closely tied up to their names as is that of commercial companies or even life insurance corporations, and a similarity is not so important to them. The brokers, agents, and insurance managers who actually decide in what company to place the business are sufficiently familiar with the personnel, location, etc. of the various companies that they could not be misled by mere similarity of names as the general public would be. This is shown by the large

number of insurance companies with very similar names. For instance, there are 15 companies having 'Standard' as the first word of their titles and three having it as the second. There are 77 having 'American' as the first word; 53, having 'National'; 22, 'United States'; 21, 'Federal'; 21, 'Central'; 20, 'Farmers'; 17, 'Fidelity'; 12, 'Lumbermans'; 21, 'Merchants'; 13, 'Employers'; 14, 'Home'; 10, 'Industrial'; 17, 'Bankers'; 24, 'Western'; 12, 'Security'; 16, 'Pacific'; 11, 'Liberty'; 15, 'General'; 9, 'Continental'; 14, 'Southern'.

* * * * *

"The conclusion that must be drawn, therefore, is that the possibility of confusing the general public is by no means the test to be applied, and that the professional insurance men and experts who are in a sense the plaintiff's public, are not likely to be misled merely by the degree of similarity in this case. The plaintiff contends, however, that the word 'Standard' has through fifty years of use become so closely identified with the plaintiff that it has acquired a secondary meaning and would be understood, when used in connection with the casualty or surety business, as referring only to the plaintiff. The plaintiff has advertised extensively, but never to the general public. It has published house organs for its own agency force; has periodically circularized a large mailing list composed of the mailing lists of its own agents and averaging about 240,000 names; has advertised in the trade journals devoted to the casualty and surety business; and has spent \$942,000 on all its advertising in the last seven years. In it the plaintiff has re-

ferred to itself as 'The Standard' and the 'Standard Accident Insurance Company'. But as bearing on the question whether the word 'Standard' has become synonymous with the plaintiff's name, it must be borne in mind that those to whom it was addressed were largely the class of brokers, agents, and insurance managers who were not only familiar but dealt with many other insurance companies having it as the first word of their titles. It is true these other companies were, with one exception, not in the casualty and surety line, but they would nevertheless be a great deterrent to the word acquiring a secondary meaning as referring only to the plaintiff. Two of those companies had long antedated the plaintiff in its use.

"Numerous witnesses testified either in open court or by deposition, for either the plaintiff or for the defendant, as to whether the word 'Standard' has become synonymous with the plaintiff's name and whether the similarity would cause confusion. This testimony is about equally cogent on both sides. Furthermore, the plaintiff proved a number of instances of actual confusion, principally involving misdirected or misdelivered mail. In no case did the confusion involve a loss of business to the plaintiff. They were practically all errors of clerical workers who misdirected mail to the plaintiff which should have gone to the defendant, and not errors of insurance men who were confused as to which company they were dealing with. Considering the large amount of mail received by both companies and the numerous transactions in which they participated, I do not find these instances of confusion impres-

sive. Many such would occur even if the names were very dissimilar.

* * * * *

“Considering all the facts and circumstances, I have come to the conclusion that the word ‘Standard’ has not acquired in the plaintiff’s line of business the generally recognized secondary meaning which would make it the equivalent of the plaintiff’s name; that the names of the two parties are not so similar as to confuse those who in the ordinary course would have occasion to distinguish between them; and that, therefore, there is no unfair competition by the defendant. Undoubtedly, the plaintiff has frequently been designated ‘The Standard’ when there was no occasion to distinguish it from any other company with that word in its title; and undoubtedly, also, there will be isolated instances of confusion by persons dealing with either of the parties. But I do not believe that the plaintiff is entitled to appropriate to its exclusive use so common and desirable a word as ‘Standard’ without a much stronger showing than presented in this case.”

See, also:

Selchow and Righter v. Western Printing & Lithographing Co. (D.C., E.D., Wis.), 47 Fed. Supp. 322;

Steem Electric Corp. v. Herzfeld (C.C.A. 7 Cir.), 118 Fed. (2d) 122.

The rule of these cases is an essential deduction from the reason for the law of unfair competition and

“secondary meaning”. The rule is logical, established and is conclusive of this case.

Appellants rely upon the case of *Aetna Casualty Co. v. Aetna Auto Finance Co.* (C.C.A. 5 Cir.), 123 F. (2d) 582. This case (like the case of *Academy of Motion Picture Arts v. Benson*, 15 Cal. (2d) 685 (104 P. (2d) 650)) was not decided upon the basis of similarity of names. The defendant there was wrongfully and deliberately seeking to mislead the public into thinking that *it was* the plaintiff. This constitutes an unfair trade practice without regard to similarity of names. In the instant case, the good faith of appellee is established.

IV.

CONCLUSION.

It was plaintiff's burden in the trial Court to prove that the words “American Auto” had a secondary meaning; that such secondary meaning identified appellants and appellants only in the minds of the public who heard them; that the corporate name of appellee was so similar that it would be identified, by people who knew appellants, with appellants; that as a result of such confusion appellants would suffer injury or the public would be misled to its detriment.

In spite of the existence of this burden of proof the record established by a great preponderance exactly the contrary. It shows that the public does not know appellants as “American Auto” and that at

least four or five of them each day call appellants under the belief that "American Auto" means American Automobile Association; that the people who do know appellants and deal with them would not be confused by the existence of appellee; and that no damage can result to appellants and no confusion to anyone from the use by appellee of its corporate name.

Appellee submits that the judgment of the trial Court was correct and that it should be affirmed.

Dated, San Francisco, California,

July 17, 1950.

Respectfully submitted,

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